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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDOLPH WARE,

Defendant and Appellant.

B301101

Los Angeles County
Super. Ct. No. A038412

APPEAL from an order of the Superior Court of
Los Angeles County, Laura L. Laesecke, Judge. Affirmed.

Law Office of David W. Beaudreau and David W.
Beaudreau, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In October 1997 a jury convicted defendant and appellant Randolph Ware of the second degree murder ten years earlier of Alvin Dennis Boyd. The jury found true an allegation that, in the commission of the murder, Ware used a firearm (a rifle). The trial court sentenced Ware to 17 years to life in the state prison: 15 to life for the murder and two years for the firearm enhancement. The court imposed a restitution fine of \$10,000 under Penal Code section 1202.4, subdivision (b).¹

Nearly 22 years later, on July 15, 2019, Ware—in propria persona—filed a document entitled “Motion to Vacate and Correct Illegal Sentence.” Ware asserted the “court unlawfully imposed a \$10,000.00 Restitution fine, pursuant to Penal Code § 1202.45 [sic].” Ware argued the “court failed to suspend the fine or make a determination of whether the Petitioner has the ‘Ability to Pay’ the required by law in (1997) [sic].” Ware also seemed to contend the California Department of Corrections and Rehabilitation had been taking money from his account under section 1202.45 rather than section 1202.4. Ware attached the first but not the second page of the abstract of judgment. He also attached a document showing that he remains in state prison and that he owes a balance of about \$5,500 on the restitution fine.

On July 22, 2019, the trial court denied Ware’s motion in a written order. The court quoted section 1202.4, subdivision (c), that a defendant’s inability to pay the restitution fine under section 1202.4 “shall not be considered a compelling and extraordinary reason not to impose a restitution fine.” (§ 1202.4, subd. (c).)

Ware appealed and we appointed counsel to represent him. After examining the record, counsel filed an opening brief raising no issues and asking this court independently to review the

¹ References to statutes are to the Penal Code.

record under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel notified Ware that he could file a supplemental brief within 30 days.

On March 2, 2020, Ware submitted a document entitled “Supplemental Pro/Per Brief Contesting Wende Brief.” In his supplemental brief, Ware asserts—contrary to his motion in the trial court—that he is *not* claiming the sentencing court should have determined his ability to pay the restitution fine.² Instead, Ware argues the court should have stayed the restitution fine until he “violates parole.” Ware also contends his appellate counsel “failed to secure” a reporter’s transcript of the November 1997 sentencing proceedings and “[t]he record for the appeal is incomplete.” None of Ware’s contentions has merit.

The minute order of the sentencing states the court imposed the \$10,000 restitution fine under section 1202.4, subdivision (b). Ware asserts, “based on his memory,” that the fine was imposed not under section 1202.4 but, instead, under

² In any event, any such argument would be meritless. When Ware was sentenced in 1997, the minimum restitution fine for felony convictions was \$200 and the maximum fine was \$10,000. (Former § 1202.4, subd. (b)(1).) “A trial court may consider inability to pay when ‘increasing the amount of the restitution fine in excess of the minimum fine’” (§ 1202.4, subd. (c).) “It is well established that a defendant forfeits a challenge to the trial court’s imposition of a restitution fine above the statutory minimum for failing to consider his or her ability to pay if the defendant did not object in the trial court. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 [alleged erroneous failure to consider ability to pay a \$10,000 restitution fine forfeited by the failure to object]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture rule applies to claim that restitution fine amounted to an unauthorized sentence based on inability to pay].)” (*People v. Smith* (2020) 46 Cal.App.5th 375, 395.

section 1202.45. He is wrong. Nothing in the record supports that assertion. Moreover, the lack of a reporter's transcript is due to Ware's extraordinary delay of 20 years in filing his motion. As the affidavits of the court reporters state, the reporter who reported the proceedings on the November 1997 sentencing date has retired, and the court reporters' office destroys reporters' notes after 10 years.

Ware also complains his appellate counsel "failed to provide the Court with a copy of his Motion to Consider [*sic*] and Reinstate the Proceeding." Ware attaches a pleading dated February 23, 2020, entitled "Motion to Reconsider and Reinstate Motion to Vacate."³ But Ware did not appeal from any denial by the trial court of any motion to reconsider. Ware's notice of appeal, filed August 23, 2019, appeals only from an "August 7, 2019" order, which he describes as the "Denial of Motion to Vacate and Correct Illegal Sentence." (We assume Ware means to refer to the court's written order dated July 22, 2019, denying his motion with that title.)

Finally, to the extent Ware's statement in his supplemental brief "request[ing] this Court to appoint new Counsel to assist him in responding to the *Wende* brief" can be considered a *Marsden*⁴ motion, we have reviewed the record along with the briefs filed by appointed counsel and Ware. We are satisfied that Ware's counsel has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

³ Ware states he also is attaching a "written Order denying the Motion to Reconsider" but no such order is attached.

⁴ *People v. Marsden* (1970) 2 Cal.3d 118.

DISPOSITION

We affirm the trial court's order denying Randolph Ware's
"Motion to Vacate and Correct Illegal Sentence."

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.